COURT OF APPEALS
DECISION
DATED AND FILED

November 30, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP206 **Cir. Ct. No. 2003CV447**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

BITUMINOUS FIRE AND MARINE INSURANCE COMPANY,

PLAINTIFF-RESPONDENT,

V.

STAAB CONSTRUCTION CORPORATION, TOWNE & COUNTRY ELECTRIC, INC., FAITH TECHNOLOGIES, INC. AND TILING BY MARV, L.L.C.,

DEFENDANTS,

ASSURANCE COMPANY OF AMERICA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County: JAMES M. MASON, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Assurance Company of America appeals a judgment awarding $107,016.83 to Bituminous Fire and Marine Insurance Company. The court awarded judgment by default after Assurance failed to timely answer the complaint of Bituminous. The issue is whether the trial court properly exercised its discretion in granting judgment. We affirm.

¶2 Bituminous filed a complaint alleging a subrogated property damage claim against Staab Construction Corporation. An amended complaint added Assurance as a defendant, and alleged that it too was liable as Staab's insurer. Bituminous served the amended complaint on December 29, 2004. Assurance did not file its answer until March 14, 2005, well after its due date.

¶3 Assurance moved to excuse its delinquent filing, and Bituminous moved for default judgment. Submissions by affidavit established that an employee in a regional office faxed the pleading to Assurance's main office, to the attention of Gerhard Pagels. However, Pagels never received it. Consequently, Assurance took no action on the complaint until Pagels learned of it on March 2, 2005, after receiving a call from the regional office inquiring about the matter. Only then did Assurance file an answer. In affidavits filed with the court, Pagels offered theories as to what happened, including a malfunctioning fax machine, computer failure, or a routing error, but could not say why he did not receive the transmission.

¶4 The trial court concluded that Assurance had not demonstrated excusable neglect. The court reasoned that, since pleadings are a regular part of the business of an insurance company, proper management of business required safeguards to prevent lost documents and subsequent delinquencies.

¶5 We review the trial court's decision to grant default judgment applying the erroneous exercise of discretion standard. ***Connor v. Connor***, 2001 WI 49, ¶18, 243 Wis. 2d 279, 627 N.W.2d 182. The court properly exercises its discretion if it examines the relevant facts, applies a proper standard of law, and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). We will affirm a discretionary determination if the record shows the discretion was in fact exercised and we can perceive a reasonable basis for the court's decision. ***Prahl v. Brosamle***, 142 Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987).

¶6 In determining whether to grant default judgment the court first determines whether the party's delinquency was the product of excusable neglect. ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 468, 326 N.W.2d 727 (1982). Excusable neglect is "'neglect which might have been the act of a reasonably prudent person under the same circumstances.'" ***Id.*** (citation omitted). It is not synonymous with neglect, carelessness or inattentiveness. ***Id.*** It is "'not sufficient that the delinquency be unintentional in the sense of a mistake or inadvertence.'" ***Martin v. Griffin***, 117 Wis. 2d 438, 443, 344 N.W.2d 206 (Ct. App. 1984).

¶7 Assurance contends that the trial court unreasonably found no excusable neglect because its reliance on the fax transmission was a reasonable business practice. However, we conclude that the trial court reasonably reached the opposite conclusion. The means to protect against the consequences of transmission, computer or routing mistakes are inexpensive and readily available, including follow up phone calls, mailing or delivery of hard copies, or a system whereby the receiver of faxed documents transmits confirmation of receipt. The court could reasonably conclude that Assurance's failure to adopt such procedures

warranted a finding of no excusable neglect, particularly because handling claims and lawsuits is a regular part of its business as an insurer.

¶8 Assurance next contends that the trial court erroneously disregarded several significant factors in its decision, including (1) prompt remedial action, (2) the absence of any prejudice from its twenty-four day delinquency, (3) the merits of its case, and (4) whether the interest in deciding the case on its merits outweighed the finality of judgment consideration. However, under Wisconsin law, courts address such arguments only if the neglect was excusable.

> In determining whether to grant the dilatory party relief, the first step is to determine if there are reasonable grounds for the noncompliance with the statutory time period (excusable neglect). If a motion is made after the expiration of the specified time, an order enlarging the time for performing an act must be based on a finding of excusable neglect; when the circuit court determines that there is no excusable neglect, the motion must be denied.

Hedtcke, 109 Wis. 2d at 468. The trial court properly determined that the absence of excusable neglect was dispositive. Having found no excusable neglect, the court properly declined to consider other factors.

¶9 After the trial court granted default, Assurance moved for reconsideration, citing newly discovered evidence that, it contended, would conclusively provide a defense to Bituminous' claim. Assurance now contends that denial of this motion was also an erroneous exercise of discretion. However, the same ***Hedtcke*** principle applies. Having found no excusable neglect, the court was under no obligation to consider the merits of the defense as a factor in weighing Assurance's delinquency. The strength of Assurance's defense remained irrelevant.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.